92-1693

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT E. JOHNSON,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 23, 1993

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Question Presented

Whether the court below erred in affirming summary judgment, based on failure to comply with the three year Federal Employers' Liability Act Statute of Limitations, where substantial evidence shows Johnson filed his action within three years of the date he first became aware of his injury as required by an applicable decision of this Court.

NO. _____

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ROBERT E. JOHNSON,

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v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert E. Johnson hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The order and opinion of the United States District Court for the Western District of Virginia (App. 11a; 12a-16a) are not reported.. The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-10a) is not reported.

JURISDICTION

The United States District Court for the Western District of Virginia granted Norfolk and Western Railway Company's motion for summary judgment on May 15,1992. The United States Court of Appeals for the Fourth Circuit affirmed on January 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section six of the Federal Employers' Liability Act provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. §56.

STATEMENT OF THE CASE

Robert Johnson brought this action against Norfolk and Western Railway Company (NW) on November 15, 1988 under 45 U.S.C. §51 *et. seq.*, the Federal Employers' Liability Act (FELA). He alleged that NW negligently exposed him to excessive sound levels in the NW Computer Center where he worked, resulting in permanent damage to his hearing.

After a period of discovery, NW moved for summary judgment claiming that Johnson had not complied with 45 U.S.C. §56, the three year FELA statute of limitations. Mr.

Johnson responded to the motion by presenting evidence that, although he does not recall the exact date that he first became aware of his injury, the date was between May 16, 1986 and December 12, 1986. App. 13a-14a. Thus, his filing on November 15, 1988 was timely.

Johnson first considered the possibility that he might have been injured by exposure to noise on the job after NW performed sound level testing at his workplace on May 16, 1986, which led Johnson and several of his co-workers to discuss hearing problems they shared. Id. Johnson has maintained that the discussion, prompted by NW's action, led him for the first time to consider the possibility that he had suffered a hearing loss, which in turn prompted him to have his first hearing examination (with Dr. McLean on December 12, 1986). Id. In his deposition and during separate examinations by Doctors Schumaier and Villeneuve, he reported that he only became aware in 1986 that he was suffering permanent hearing problems. App. 8a. He did not notice the problems earlier because the loss was so gradual as to be unnoticeable. App. 13a. The Occupational Safety and Health Administration has noted that noise-induced permanent threshold shift:

> is particularly insidious because it occurs very gradually over time. In fact, for a long time the worker may not notice any change in hearing acuity until the hearing loss begins to interfere with everyday communication.

48 Fed. Reg. 9740 (March 8, 1983).

The District Court granted NW's motion for summary judgment and Johnson appealed to the United States Court of Appeals for the Fourth Circuit. Before the Fourth Circuit Court, Johnson again argued that he did not consider the possibility that he might have been injured by occupational noise exposure until 1986. App. 8a. Doctor McLean's notes indicate Johnson may have noticed hearing problems two years before he was ex-

amined on December 12, 1986. Johnson admitted that he cannot recall when his hearing problems began, and that they may have begun as early as 1979 (when he began working in NW's computer center). Relying on these facts, a divided panel affirmed. App. 1a-10a.

ARGUMENT

The court below affirmed summary judgment based on when Johnson's hearing problems began. When his hearing problems began does not necessarily determine when his cause of action accrued. *Urie v. Thompson*, 337 U.S. 163 (1945). *Urie* established that the discovery rule applies to FELA cases. Although all courts asked to determine when a hearing loss claim accrued under the FELA agree that *Urie* controls, the applications have varied widely.

In Smith v. States Marine Intern., Inc., 864 F. 2d 410 (5th Cir. 1989), where the plaintiff knew of his hearing loss in the mid-1970's, ignored the entreaties of his wife and friends to seek medical advice, retired in 1982 because of his hearing loss, and did not file suit until 1987, the court reversed summary judgment. But in *Fries v. Chicago & Northwestern Transp. Co.*, 909 F. 2d 1092 (7th Cir. 1990), the court engrafted onto *Urie* the requirement to investigate with reasonable diligence a known hearing loss. The court, finding that the plaintiff was not sufficiently diligent, affirmed summary judgment. In *Bechtholdt v. Union Pac. R.R. Co.*, 722 F. Supp. 704 (D. Wyo. 1989), the court denied summary judgment because it maybe fallacious to infer the plaintiffs had knowledge of their injury due to episodes of difficulty hearing and ringing in the ears. The court below rejected the same arguments that persuaded the court in *Bechtholdt*. App. 5a-6a. The Supreme Court of Nebraska held that this issue cannot be decided as a matter of law. *Monagahan v. Union Pac. R. R. Co.*, 242 Neb. 720 (1993). Other courts, applying the new rule that all abnormalities must be diligently investigated, have held that a cause of action accrues whenever

the plaintiff's ears first manifest any abnormality. See, e.g., *Robb v. CSX Transp., Inc.*, 204 Ga. App. 690, 420 S.E. 2d 370 (1992).

Holding that a cause of action accrues when any abnormalitiy manifests eviscerates the discovery rule. Courts following this reasoning encourage railroad workers to file lawsuits, many of which will ultimately prove to be meritless. They will file now rather than risk losing their rights under the FELA, on inevitable motions for summary judgment, because some presently innocuous event could later be held as a matter of law to be was the first symptom of a progressive occupational injury.

CONCLUSION

This petition should be granted because the court below decided this case in a way that conflicts with an applicable decision of this Court, and because both state and federal courts have rendered, and will continue to render, conflicting decisions in cases of this type.

Respectfully submitted,

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Counsel for Petitioner

April 23, 1993.

APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1719

ROBERT E. JOHNSON,
Plaintiff-Appellant,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States
District Court for the
Western District of Virginia,
at Roanoke

James C. Turk, Chief District Judge
(CA-88-549-R)

Argued: December 1, 1992
Decided: January 28, 1993
Before MURNAGHAN, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished opinion. Judge Luttig wrote the opinion, in which Judge Williams joined. Judge Murnaghan wrote a dissenting opinion.

COUNSEL

ARGUED: John Roy Fabry, JONES & GRANGER, Houston, Texas, for Appellant. William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellee. **ON BRIEF:** Thomas A. Leggette, Frank K. Friedman, Mark D. Loftis, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See **I.O.P.** 36.5 and 36.6.

OPINION

LUTTIG, Circuit Judge:

Robert E. Johnson brings this appeal from an order of the district court granting summary judgment to Norfolk and Western Railway Company on Johnson's action under the Federal Employers' Liability Act, 45 U.S.C. §§51 *et seq.*. The district court held that Mr. Johnson's claim was time-barred. We affirm.

I.

The memorandum opinion accompanying the district court's order summarizes the pertinent facts in the case, and we recount them here only to the extent necessary to resolve this appeal. Johnson brought his Federal Employers' Liability Act [FELA] action against his employer, Norfolk and Western, on November 15, 1988, alleging that he had suffered noise-induced hearing loss from working in appellee's computer center, where he had been employed since 1979. In deposition, Johnson stated that at some point while at the computer center he began experiencing difficulties with his hearing. He testified that his hearing was worse at the end of the work day than at the beginning, that he had to turn up the volume on his radio to hear it when he returned home from work, that he was having trouble hearing during conversations, and that he sometimes ex-

perienced a ringing sensation in his ears. Despite repeated questioning, however, Johnson could not identify a specific date when he first noticed these problems, and he admitted that they might have begun as early as 1979. J.A. at 22-25, 30-33. Johnson also stated that he could think of nothing other than the noise in the computer center that could have caused his hearing impairment. *Id.* at 35.

The only evidence that bore directly on the question of when Johnson's hearing difficulties began was the report of Dr. W. C. McLean, Johnson's physician, which was completed following Dr. McLean's examination of Johnson on December 12, 1986. Dr. McLean stated in that report that "[o]ver the past 2 yrs. [Johnson] notes that he does not hear well." *Id.* at 65. On the strength of Johnson's deposition testimony and Dr. McLean's report of Johnson's statements to him, Norfolk and Western moved for summary judgment, arguing that Johnson could not prove compliance with the FELA three-year statute of limitations.

The district court granted Norfolk and Western's motion, observing that a cause of action accrues under FELA only when the plaintiff knows or should know both of his injury and its cause. *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949); *Townley v. Norfolk & Western Ry.*, 887 F.2d 498, 501 (4th Cir. 1989). The court held that the hearing difficulties experienced by Johnson to which he testified were sufficient to give Johnson reason to know of his injury. Because, according to Dr. McLean's report of Johnson's own statements, Johnson knew of these hearing problems as of December 12, 1984, more than three years before he filed suit, the district court held that Johnson's suit was time-barred. J.A. at 95.

II.

No action may be maintained under FELA "unless commenced within three years from the day the cause of action

accrued." 45 U.S.C. §56. As Johnson concedes, Appellant's Br. at 11, this statute of limitations is not an affirmative defense; instead, compliance with 45 U.S.C. §56 is a condition precedent to recovery under the Act. Failure to bring suit within the statutory period "destroys the employer's liability" and bars the claimant's recovery. *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." *Id.* at 1118; *accord Rohner v. Union Pac. R.R.*, 225 F.2d 272, 274 n.7 (10th Cir. 1955); *Carpenter v. Erie R. Co.*, 132 F.2d 362 (3rd Cir. 1942), *cert. denied*, 318 U.S. 788 (1943); *American R. Co. v. Coronas*, 230 F. 545, 546 (1st Cir. 1916).

We agree with the district court that Johnson cannot carry his burden of proof to establish that he instituted suit within three years of the accrual of his cause of action. It is evident from Dr. McLean's report that Johnson himself believed that he had been injured at least as of December 12, 1984.[1] Even without Dr. McLean's report, Johnson would be unable to prove to a rational fact-finder that he complied with the statute of limitations, because he admittedly cannot remember when his hearing problems began and, indeed, he testified that they may have begun as early as 1979. The court therefore correctly held that Johnson's FELA claim, which was brought nearly four years after he knew or should have known of his injury, was time-barred.[2] *See Townley*, 887 F.2d at 501; *Young v. Clinchfield R.R.*, 288 F.2d 499, 503 (4th Cir. 1961).

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[1] On appeal, Johnson makes a half-hearted effort to discredit this medical report. See Appellant's Br. at 3-4. Johnson himself offered the report into evidence in the court below, however, and he has identified, and we can discern, no reasonable basis to question the accuracy of the report.

[2] Johnson argues that even if he should have known that he was injured in 1984, the district court should still be reversed because it made no finding that he also should have known at that time that the cause of his injury was

Johnson challenges this conclusion by arguing that, although he may have experienced *temporary* hearing problems, or temporary threshold shift [TTS], in 1984 or before, he first realized that he might have *permanent* hearing loss during a conversation with co-workers that occurred sometime between May 16 and December 12, 1986. Since only permanent hearing loss is actionable under FELA, he reasons that he filed suit within three years of the time his action actually accrued. *See* Appellant's Br. at 11-17. We reject this *post hoc* effort to distinguish between temporary and permanent hearing loss for purposes of tolling the FELA statute of limitations. In many if not most cases, the dichotomy is false, since recurrent temporary (i.e., lasting for a day or two) hearing loss is a recognized symptom of permanent injury. Johnson's own expert Dr. Schumaier noted in his affidavit that "repeated episodes of TTS" are a sign that "permanent injury is occurring." J.A. at 74 par. 6. As the district court held, when Johnson began experiencing a ringing sensation in his ears and began noticing that his hearing was worse at the end of the work day than at the beginning, that he was forced to turn up his radio very loud in order to hear it when returning home from work, and that he was having trouble hearing conversations, he should have known of his work-related injury for purposes of the FELA statute of limitations. *See Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 40 (5th Cir. 1991) (temporary hearing loss and ringing in ears provided constructive notice of work-related injury to FELA claimant); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1097 (7th Cir. 1990) (temporary work-related ringing in the ears put plaintiff on constructive notice of injury for FELA purposes);

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work-related, as *Urie* requires. Appellant's Br. at 17-21. The district court, however, was fully aware of *Urie*, and its recitation of the fact that Johnson "could not think of anything other than the noise at the computer center that might have caused his hearing loss," J.A. at 93, constitutes at the very least an implicit finding that Johnson also was on notice of the cause of his hearing problems.

Billman v. Missouri Pac. R.R., 825 S.W.2d 525, 528 (Tex.Ct. App. 1992) (holding that even if FELA claimant thought work-related hearing loss was only temporary, his awareness of the problem started the running of limitations); *Robb v. CSX Transp., Inc.*, 204 Ga.App. 690, 420 S.E.2d 370, 373 (1992) (same; rejecting argument that symptoms of TTS were insufficient to constitute constructive notice of work-related injury).[3]

III.

The district properly held on the evidence before it that as a matter of law Mr. Johnson should have known of his work-related hearing injury as of December 12, 1984. Because Johnson did not file suit until November 15, 1988, and compliance with the three-year statute of limitations is an essential element of a FELA claim, his action was time-barred.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that "Even without Dr. McLean's report, Johnson would be unable to prove to a rational fact-finder that he complied with the statute of limitations, because he admittedly cannot remember when his hearing problems began and, indeed, he testified that they may have begun as early as 1979." Under my reading of the applicable legal standards and the evidence presented by Johnson, Johnson has provided sufficient evidence for the question to be taken to a jury.

In a suit under FELA, the employee bears the burden of proving that his or her cause of action was commenced within

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[3] *Compare Bechtholdt v. Union Pac. R.R.*, 722 F.Supp. 704, 708 (D. Wyo. 1989) ("inferring the plaintiffs had knowledge of their injury due to TTS symptoms may be fallacious"). Unlike Johnson, the plaintiffs in *Bechtholdt* believed their hearing problems were caused either by aging or an automobile accident, not by work. *Id.* at 705.

the three-year statute of limitations. *See, e.g., Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). Ordinarily, it is clear from the circumstances of the injury when the statute of limitations begins to run. Sometimes, however, as in the case at hand, a plaintiff may be unaware when the injury actually occurs. In those instances, courts apply a "discovery rule" to determine when the statute begins to run. Under the discovery rule, an action accrues when the plaintiff knew or should have known of his or her injury and its cause. *Urie v. Thompson*, 337 U.S. 163 (1949); *Young v. Clinchfield R.Co.*, 288 F.2d 499 (4th Cir. 1961); *Townley v. Norfolk & W. R. Co.*, 887 F.2d 498 (4th Cir. 1989). "Under *Urie*'s rationale, when an occupational illness is the basis for the claim under FELA, the statute of limitations begins to run when the employee becomes aware of his disease and its cause." *In re Central R. Co.*, 950 F.2d 887, 891 (3rd Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1586 (1992).

Thus, in the present case, Johnson would have had the burden of proving at trial, by a preponderance of the evidence, that he did not have the requisite knowledge of both injury and cause prior to November 15, 1985. He did not have an opportunity to do so because the district court granted summary judgment against him on the grounds that his claim was time-barred.

Summary judgment only is appropriate where there is "no genuine issue of any material fact." In ruling on a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Since Johnson bore the burden of proof with respect to an essential element of a FELA claim, timeliness, he must have demonstrated a genuine factual dispute with respect to that element in order to defeat the motion for summary judgment.

According to Johnson, the question of possible auditory damage first arose when his employer instituted sound testing of his workplace in 1986, which led several of his co-workers to discuss hearing problems they shared. Johnson has maintained that the discussion prompted by Norfolk and Western's action led him in the first instance to consider the possibility that he had suffered a hearing loss, which in turn prompted him to have his first hearing examination (with Dr. McLean). In his deposition and during separate examinations by Doctors Schumaier and Villeneuve, he contended that he only became aware in 1986 that he was suffering persistent and possibly permanent hearing problems. J.A. at 51-55. He argues that he did not notice the problem earlier because the loss was so gradual as to be unnoticeable. The Occupational Safety and Health Administration has noted that noise-induced permanent threshold shift:

> is particularly insidious because it occurs very gradually over time. In fact, for a long time the worker may not notice any change in hearing acuity until the hearing loss begins to interfere with everyday communication.

48 Fed. Reg. 9740 (March 8, 1983).

It certainly is possible that Johnson did not notice the persistence of his auditory difficulties until 1986 when Norfolk and Western checked the sound level at his workplace and his co-workers mentioned shared problems. Dr. Schumaier stated that there was no reason why Johnson should have noticed his hearing problems at an earlier time.

Johnson argues that the district court relied too heavily on the one sentence in Dr. McLean's 1986 medical records stating that "[o]ver the past 2 yrs. he notes that he does not hear well." Given that such records are normally dictated at a later time, it certainly is possible that they are not accurate regarding minor points. Moreover, it is possible that Johnson, after being told of

his permanent loss, realized that he had experienced symptoms at earlier dates. However, like the appellant in *Urie*, Johnson may not have experienced symptoms significant enough that he should have realized they reflected permanent and actionable injury.

Given the preference for allowing juries to make such decisions, the determination of when Johnson knew or should have known of his injury should go to the jury. "As to the accrual of a cause of action for a negligently caused occupational disease, it has been said that the question when an employee knew or should have known that he had an occupational disease is one of fact and thus ordinarily to be determined by a jury." *Accrual of cause of action and tolling of limitation period of §6 of the Federal Employers' Liability Act (45 U.S.C. §56)*, 16 A.L.Rd3d 637, §2b (1991). The Fifth Circuit, source of the *Emmons* decision, has acknowledged that "[t]aking an issue away from the jury is appropriate only when there is a 'complete absence of probative facts' to support a verdict in favor of the plaintiff." *Wilson v. Zapata Off-Shore Company*, 939 F.2d 260, 266 n.9 (5th Cir. 1991). In the present case, unlike *Emmons*,* there is not a complete absence of probative facts.

The Supreme Court has underscored the importance of deferring to juries:

> Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination,

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* In *Emmons*, the plaintiff conceded in his deposition that he was aware in early 1987 (four years prior to his filing suit under FELA) that he had a permanent hearing loss and that he believed it was due to railroad noise. In fact, Emmons went to a doctor in 1987 regarding his hearing problems. Emmons' only challenge to the statute of limitations was that the doctor he visited in 1987 failed to inform him that his loss was occupational in source. Logically, the Fifth Circuit found the argument without enough force to create a genuine issue of material fact.

Here, the plaintiff contends that he did not notice a persistent loss until 1986 (within the three-year period) and went to a doctor for the first time upon that realization.

> this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

Rogers v. Missouri P. R. Co., 352 U.S. 500 (1957).

Thus, a question, capable of resolution by a jury examination of disputed facts, exists as to whether the three year limitation period had expired prior to the filing of suit. Hence, I dissent and would remand so the case may be tried to a jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 88-0549-R

ROBERT E. JOHNSON,

Plaintiff,

against

NORFOLK & WESTERN RY. CO.,

Defendant.

Upon a Motion for Summary Judgment

In accordance with the Memorandum Opinion entered this day, it is hereby

ADJUDGED AND ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED.

The Clerk of the Court is directed to strike this matter from the active docket of this Court and to send certified copies of this order to all parties of record.

ENTERED: May 15, 1992

/s/ James C. Turk
JAMES C. TURK
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 88-0549-R

ROBERT E. JOHNSON,

Plaintiff,

against

NORFOLK & WESTERN RY. CO.,

Defendant.

MEMORANDUM OPINION

The Norfolk and Western Railway Co. ("N&W") has moved the Court to grant it judgment as a matter of law, alleging that Mr. Johnson has not filed suit within the applicable statute of limitations and thus is time-barred from pursuing his hearing loss claim. The applicable statute of limitations is three years from the accrual of the cause of action. 45 U.S.C. §56. This action arises under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, *et seq.* and the court has jurisdiction pursuant to 28 U.S.C. §1331. The Court believes summary judgment is appropriate because Mr. Johnson did not file suit within three years of the date he knew, or reasonably should have known, of his hearing impairment. Therefore, Defendant's Motion for Summary Judgment will be GRANTED.

Mr. Johnson began working for N&W in 1969 as a yard clerk. He worked at the Roanoke terminal in the retarder yard. In 1979, Mr. Johnson started working at the railroad's computer center; he alleges noise exposure at the computer center contributed to his hearing loss. During the time that he worked there, he acknowledged, that he "would go out on a break or go

out for lunch and [his] hearing was worse than it was when [he] went in" that morning; that he needed to turn up the car radio in order to hear it in the evenings and "would realize the next morning it was a lot louder than [he had] thought;" that his children mentioned that he was having problems understanding them; and that he heard a ringing in his ears. When asked, Mr. Johnson could not testify to a beginning date for any of these ailments, but he does remember that the ringing in his ears was present when he had a hearing examination "in 1988 or whenever it was."

It appears from his deposition testimony that Mr. Johnson had his hearing examined after a conversation with his coworkers. The computer operators agreed that they "couldn't hear things. [They] were missing things on T.V. and things of this nature." Mr. Johnson consulted Dr. McLean, an ear, nose, and throat specialist, on December 12, 1986. Mr. Johnson said at the time of this visit, "[He] couldn't hear conversations." When he asked when he first noticed this, he replied, "A specific date, I couldn't tell you. It was sort of a gradual thing, I assume."

At this visit, Dr. McLean observed that Mr. Johnson presented a number of hearing complaints, and the doctor recorded that "Over the past 2 yrs. he notes that he does not hear well." When questioned at deposition about this visit, as a reference date for when he first started experiencing hearing problems, Mr. Johnson reiterated that he could not remember any specific year or date from which his hearing began deteriorating. He affirmed, however, that he could not think of anything other than the noise at the computer center that might have caused his hearing loss.

Mr. Johnson filed suit on November 15, 1988. In order to comply with the FELA statute of limitations, Mr. Johnson must not have known of his hearing loss before November 15, 1985. If Mr. Johnson knew of his hearing loss before that date, his suit is time-barred and summary judgment is appropriate.

Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). For the purpose of deciding the motion for summary judgment, the Court considers the facts in the light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

N&W argues that it is entitled to judgment as a matter of law because the plaintiff failed to bring his case within three years of the accrual of the cause of action. The defendant correctly states that a cause of action accrues under FELA when a plaintiff knows, or should know, of both the existence and cause of his injury. *Urie v. Thompson*, 337 U.S. 163, 169-170 (1945). The Fourth Circuit adopted this standard without significant modification in *Young v. Clinchfield Ry. Co.*, 288 F.2d 499 (4th Cir. 1961), and recently reaffirmed its adherence to the standard in *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498 (4th Cir. 1989).

Mr. Johnson argues that he did not know of his hearing loss until he talked to his co-workers shortly before he scheduled his appointment with Dr. McLean. The accrual date, he contends, must therefore be shortly before his December 12, 1986 office visit. He also remembers that the conversation took place after N&W tested the sound levels in the computer center. The tests occurred on May 16, 1986. He therefore believes that he must have become aware of his hearing loss between May 16, 1986 and December 12, 1986. By this calculation, when he filed his lawsuit on November 15, 1988, he was well within the three-year statute of limitations.

The FELA cause of action accrues, however, "when the plaintiff has reason to know he has been injured. Generally this will be when his condition is diagnosed, *unless it is shown that*

the plaintiff 'should have known' at an earlier date that he was injured." *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989) (emphasis in original). Mr. Johnson has testified that, before his doctor diagnosed hearing impairment, he experienced ringing in his ears, he found his hearing worse in the afternoons or evenings than it was in the mornings when he went to work, and that his family told him he was having problems understanding them. It cannot be said of Mr. Johnson that, like the plaintiff in the *Urie* decision, he suffered from "a disease whose symptoms had not yet obtruded on his consciousness;" Mr. Johnson's symptoms appear to have been apparent both to himself and to others before he ever sought medical advice about them. *Urie v. Thompson*, 337 U.S. 163, 169 (1945).

The evidence indicates that Mr. Johnson cannot remember any time from which he dates his hearing loss. He was unable to recall any period of deterioration at all, whether within the statute or more than three years from the day he filed suit. Dr. McLean's notes, however, indicate that Mr. Johnson had been experiencing hearing problems for two years before he consulted the doctor. Mr. Johnson also testified that his family told him of his hearing difficulties, that he heard ringing in his ears, and that he had a diminished ability to hear throughout the course of the day.

In order to recover under FELA, Mr. Johnson must have filed his claim within the statute of limitations. *Emmons v. So. Pac. Trans. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). Mr. Johnson reported to his doctor on December 12, 1986, that he had not heard well "over the past two years." Those "two years" began December 12, 1984, which is more than three years before November 15, 1988, the date on which Mr. Johnson filed suit. His claim is, therefore, time barred. Accordingly, N&W's Motion for Summary Judgment will be GRANTED. An appropriate Order shall be entered this day.

ENTERED: May 15, 1992

/s/James C. Turk
JAMES C. TURK
Judge

Supreme Court, U.S.
MAY 20

No. 92-1693

In The

Supreme Court of the United States

October Term, 1992

ROBERT E. JOHNSON,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED PRECEDENTS OF THIS COURT IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BASED ON THE STATUTE OF LIMITATIONS, WHERE THE FACTS OF THIS FELA CASE MADE CLEAR THAT THE PLAINTIFF HAD FAILED TO FILE SUIT WITHIN THREE YEARS OF THE DATE HE KNEW, OR SHOULD HAVE KNOWN, OF HIS INJURY AND ITS CAUSE?

DESIGNATION OF CORPORATE RELATIONSHIPS

Norfolk and Western Railway Company, filing this Brief in Opposition as the respondent in this proceeding, states that this is its original Designation of Corporation Relationships. The parent company of Norfolk and Western Railway Company is Norfolk Southern Railway Company. Norfolk and Western Railway Company does not have any subsidiaries (excepting wholly owned subsidiaries).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

DESIGNATION OF CORPORATE RELATIONSHIPS... ii

TABLE OF AUTHORITIES iv

STATUTE INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE DECISIONS BELOW CORRECTLY APPLIED WELL-SETTLED PRECEDENTS OF THIS COURT IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BASED ON THE STATUTE OF LIMITATIONS, WHERE THE FACTS OF THIS FELA CASE MADE CLEAR THAT THE PLAINTIFF HAD FAILED TO FILE SUIT WITHIN THREE YEARS OF THE DATE HE KNEW, OR SHOULD HAVE KNOWN, OF HIS INJURY AND ITS CAUSE 8

A. There is No Conflict Among the Lower Courts with Respect to Application of the Discovery Rule; the Decisions Turn on the Facts Peculiar to Each Case 9

B. The Courts Below did not Depart From the Prior Precedent of this Court; Rather the Courts Properly Rejected Johnson's Effort to Rewrite the Discovery Rule and Rejected Johnson's Improper Argument that the Statute of Limitations Should only be Triggered by the Plaintiff's Subjective Awareness That He Had Suffered "Permanent" Injury 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Albert v. Maine Cent. R. Co., 905 F.2d 541 (1st Cir. 1990) 10

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 9

Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) ..4, 13

Bealer v. Missouri Pac. R.R. Co., 951 F.2d 38 (5th Cir. 1991) 9, 13

Bechtholdt v. Union Pac. R.R. Co., 722 F. Supp. 704 (D. Wyo. 1989) 10, 11

Billman v. Missouri Pac. R.R., 825 S.W.2d 525 (Tex. Ct. App. 1992) 10

Carpenter v. Erie R.R. Co., 132 F.2d 362 (3d Cir. 1942), *cert. denied*, 318 U.S. 788 (1943) 8

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

Crisman v. Odeco, Inc., 932 F.2d 413 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 337 (1991) 14

Emmons v. Southern Pacific Transp. Co., 701 F.2d 1112 (5th Cir. 1983) 8

Frasure v. Union Pac. R.R. Co., 782 F. Supp. 477 (C.D. Cal. 1991) 8

Fries v. Chicago and Northwestern Transp. Co., 909 F.2d 1092 (7th Cir. 1990) 10, 13

Monagahan v. Union Pac. R.R. Co., 242 Neb. 720, 496 N.W.2d 895 (1993) 10, 11

Robb v. CSX Transp., Inc., 204 Ga. App. 690, 420 S.E.2d 370 (1992) 10

TABLE OF AUTHORITIES – Continued

Page

Smith v. States Marine Intern., Inc., 864 F.2d 410 (5th Cir. 1989) 10

Townley v. Norfolk and Western Ry. Co., 887 F.2d 498 (4th Cir. 1989) 8, 14

United States v. Kubrick, 444 U.S. 111 (1979) 6, 8

Urie v. Thompson, 337 U.S. 163 (1949) 6, 11

STATUTES

45 U.S.C. § 56 ..... 1, 8

STATUTE INVOLVED

Section six of the Federal Employers' Liability Act provides in pertinent part:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

COUNTERSTATEMENT OF THE CASE

Routine application of established legal principles to the particularized facts of this case resulted in dismissal of plaintiff's claim under the Federal Employers' Liability Act (FELA) based on the plaintiff's failure to comply with the three year statute of limitations established under the FELA, 45 U.S.C. § 56. The United States District Court for the Western District of Virginia and the United States Court of Appeals for the Fourth Circuit properly determined that plaintiff's claim was barred because it was filed more than three years from the date he knew, or in the exercise of reasonable diligence should have known, of his injury and its work-related cause.

1. Plaintiff, Robert E. Johnson, began working for the Norfolk and Western Railway Company ("NW") in 1969 as a yard clerk. (JA 18, 39.)[1] He was employed in the NW computer center from 1979 to 1990. (JA 21-23.) He filed his Complaint on November 15, 1988, alleging that

[1] All references to the Appendix filed with this Court will be made as follows: "App. ___." References to the Joint Appendix in the United States Court of Appeals for the Fourth Circuit will be made as "JA ___."

his hearing was damaged because NW had exposed him to excessive noise in the workplace.

2. Johnson provided no evidence that he filed his Complaint within the applicable statute of limitations.[2] In his deposition, Johnson testified that he simply did not "know when [his] hearing problems started." (JA 21.) He specifically recalled experiencing hearing problems during the eleven-year period of his employment in the NW computer center, but he could not relate these problems even to a *general* time period. Johnson admitted, for example, noticing that his hearing would be diminished after working in the computer center. (JA 22-23.) Asked when he noticed this problem, Johnson replied, "I couldn't give you a specific date." (JA 23.) He recalled having to turn up the volume on his radio to hear it after working in the computer center, but could not state when he first noticed this problem. (JA 24-25.) He remembered that at some point he had noticed a ringing in his ears after work, but was unable to say when he had noticed it. (JA 30.) Johnson recalled that he had experienced problems hearing conversations. (JA 31.) When asked if he had "any idea when the first time was" that he noticed this problem, Johnson replied, "I can't give you a date." (JA 31.)

3. Johnson discussed his hearing problem with a Dr. McLean, an audiologist from the University of Virginia, in December, 1986. In the records of his examination, Dr.

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[2] Johnson has conceded at every stage of the proceedings that he bears the burden of proving compliance with the statute of limitations under the FELA. (App. 4a.)

McLean wrote that Johnson presented a number of hearing complaints and that, "Over the past 2 yrs. he notes that he does not hear well." (JA 43.) Johnson was questioned extensively in his deposition about this medical report (which *he* had introduced into evidence). He admitted that he had no basis on which to dispute its substance. (JA 32-33.)

Moreover, he conceded that he could not deny that his hearing problems might have begun *long before* 1984 (the year Dr. McLean's notes indicated he was aware of his hearing loss):

> Q But *do you have any basis for denying that it might have been two years before you went to see Doctor McLean when you first noticed your hearing loss?*
>
> A *A basis, no sir.*
>
> Q Do you have any basis for denying that it might have been even earlier than that, say as early as 1982?
>
> A Again, I repeat I do not remember when that was.
>
> Q And so you do not have any basis for denying that it might have been as early as the first year you worked in the computer room, 1979?
>
> A I do not remember when it was, sir.
>
> Q But what I am asking you is whether you can deny to me that it might have been as early as 1979.
>
> A I don't have a date.

Q I know you don't have a date, and that is what I am asking. *You don't remember when it was that you first noticed it.*

A *Exactly, yes sir.*

Q *So you don't have any basis to deny that it might have been as early as 1979 when you first noticed your hearing loss.*

A *A basis, no sir.*

(JA 32-33, emphasis added.)

4. Johnson also could not identify any cause for his hearing loss other than the noise he encountered at work. (JA 35.) Thus, the source of Johnson's alleged hearing loss was uncontested.

5. After conducting written discovery and deposing Johnson, NW moved for summary judgment on the grounds that Johnson's claim was barred by his failure to comply with FELA's three-year statute of limitations. NW argued that Johnson could not prove compliance with the statute of limitations because the only pertinent evidence in the case placed the accrual of his cause of action outside the statute of limitations, and Johnson could produce no evidence showing that he had filed within the limitations period.

Johnson responded with an after-the-fact affidavit in which he sought to contradict his prior deposition testimony. (JA 69-71.)[3] Notwithstanding his prior sworn testimony that he could not recall even generally when he

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[3] It is well established that it is impermissible to use affidavits to contradict prior deposition statements. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984)

experienced his hearing problems, Johnson now stated in his affidavit that he did not become "consciously aware" that his hearing problems were "permanent" until approximately 1986. (JA 70.) While he acknowledged that he had experienced a wide variety of hearing problems prior to that date, he suggested that he had believed they were "temporary" problems.[4]

6. After full briefing and oral argument on the statute of limitations issue, the District Court entered an Order and Memorandum Opinion granting NW's Motion for Summary Judgment, holding that "Mr. Johnson did not file suit within three years of the date he knew, or reasonably should have known, of his hearing impairment." (App. 12a.) The Fourth Circuit affirmed, stating:

> We agree with the district court that Johnson cannot carry his burden of proof to establish that he instituted suit within three years of the accrual of his cause of action. It is evident from Dr. McLean's report that Johnson himself believed that he had been injured at least as of December 12, 1984. Even without Dr. McLean's report, Johnson would be unable to prove to a rational fact-finder that he complied with the statute of limitations, because he admittedly cannot remember when his hearing problems began and, indeed, he testified that they may have begun as early as 1979. The court therefore correctly held that Johnson's FELA claim, which was brought nearly four years after he knew or

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[4] For example, he alleged in his affidavit that it was not until 1986 that he realized that he had "a *constant* ringing in [his] ears," as opposed to the prior ringing in his ears which was not constant. (JA 69, emphasis added.)

> should have known of his injury, was time-barred.

(App. 4a) (citations and footnotes omitted.)

REASONS FOR DENYING THE WRIT

The question presented by Johnson's petition for certiorari does not warrant review by this Court.

1. The sole issue presented by the petition – whether the plaintiff filed his complaint within three years of the accrual of his cause of action – involves nothing more than a routine application of well-settled law – *Urie v. Thompson*, 337 U.S. 163 (1949); *United States v. Kubrick*, 444 U.S. 111 (1979); and 45 U.S.C. § 56 – to the unique facts of this case.

a. Under *Urie* and *Kubrick*, the "discovery rule" provides that a plaintiff's cause of action accrues when he knows, or in the exercise of reasonable diligence should know, of his injury and its probable cause. *Urie*, 337 U.S. at 170-71; *Kubrick*, 444 U.S. at 123. Johnson concedes that "all courts asked to determine when a hearing loss claim accrued under the FELA agree that *Urie* controls. . . . " (Petition at 4.) Johnson suggests, however, that the lower courts have departed from the precedent of this Court in their application of the discovery rule, and that a split of authority exists on the question. To the contrary, the cases to which Johnson points as evidence of a "conflict" simply reflect a spectrum of possible outcomes under the *Urie* analysis depending upon the particular facts of each case.

Certainly the facts of this case mandated an award of summary judgment on the basis of plaintiff's failure to file his claim within the applicable statute of limitations. Johnson cites no case in which the plaintiff was deemed to comply with the statute of limitations where, as here, (1) the plaintiff conceded there was no possible source of injury other than exposure to work-related noise, (2) the plaintiff's own medical evidence showed that he was cognizant of his hearing loss at least four years prior to filing his claim, and (3) the plaintiff's sworn deposition testimony showed that he could not deny that the hearing loss could have occurred as much as nine years before suit was instituted.

b. Faced with a total absence of evidence that he filed his action within the statute of limitations, Johnson attempts to rewrite the discovery rule. He argues that the statute of limitations should not have been triggered until he became "consciously aware" that his injury was "permanent," notwithstanding his years of prior hearing problems. Suffice it to say, the discovery rule as established by this Court is an objective test, rather than a subjective one. As the court below properly ruled, a plaintiff cannot hold the statute of limitations in abeyance by simply ignoring years of hearing problems and then claim that the limitations period only began to run when the problems were finally diagnosed or recognized as "permanent." There are no cases which support Johnson's subjective analysis. Under existing standards Johnson's claim clearly was time-barred. Johnson's effort to expand the traditional discovery rule should be rejected and his petition denied.

I. THE DECISIONS BELOW CORRECTLY APPLIED WELL-SETTLED PRECEDENTS OF THIS COURT IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT BASED ON THE STATUTE OF LIMITATIONS, WHERE THE FACTS OF THIS FELA CASE MADE CLEAR THAT THE PLAINTIFF HAD FAILED TO FILE SUIT WITHIN THREE YEARS OF THE DATE HE KNEW, OR SHOULD HAVE KNOWN, OF HIS INJURY AND ITS CAUSE.

Under FELA, a cause of action is time-barred "unless commenced within three years from the day the cause of action accrued." 45 U.S.C.A. § 56 (1981). The statute of limitations under FELA is not an affirmative defense; rather, compliance with the statute is a condition precedent to recovery. *Emmons v. Southern Pacific Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983); *Frasure v. Union Pac. R.R. Co.*, 782 F. Supp. 477, 479 (C.D. Cal. 1991). "The burden is therefore on the claimant to allege and to prove that his cause of action was commenced within the three-year period." *Emmons*, 701 F.2d at 1118; *see Carpenter v. Erie R.R. Co.*, 132 F.2d 362, 363 (3d Cir. 1942), *cert. denied*, 318 U.S. 788 (1943). Contrary to Johnson's claims, the accrual of a cause of action under the precedent of this Court does not necessarily coincide with the date the plaintiff becomes "consciously aware of," or receives a medical diagnosis of, work-related injury. *United States v. Kubrick*, 444 U.S. 111, 123 (1979). Rather, it accrues when the claimant knows, *or in the exercise of reasonable diligence should know*, of his injury and its potential cause. *United States v. Kubrick*, 444 U.S. at 122-23; *Townley v. Norfolk and Western Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989).

The courts below properly granted NW's Motion for Summary Judgment in this case because, on the record, Johnson produced no evidence to support his claim that he filed his suit within three years of the date he knew, or should have known, of his injury. In fact, the evidence clearly revealed that Johnson was aware of his hearing problems (and their relation to noise exposure at work) at least four years before he filed suit. (JA 65, 35.) Moreover, the evidence revealed that Johnson could not rule out that he was aware of his hearing problems as early as 1979, nine years before he filed his claim. (JA 32-33.) Under these facts, and where plaintiff bore the burden of proof on this point at trial (App. 4a), summary judgment was properly granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986).

A. There is No Conflict Among the Lower Courts with Respect to Application of the Discovery Rule; the Decisions turn on the Facts Peculiar to Each Case.

Plaintiff's effort to cultivate a "conflict" in the lower courts' application of the discovery rule in FELA cases is without merit. The cases presented by plaintiff as illustrating this "conflict" simply reflect the spectrum of outcomes that can occur under the discovery rule, depending on the particular facts of a given case.

As plaintiff observes, courts routinely have found FELA claims to accrue when the plaintiff knew or *should have known* that his hearing loss was work-related. *E.g., Bealor v. Missouri Pac. R.R. Co.*, 951 F.2d 38, 40 (5th Cir.

1991) (temporary hearing loss and ringing in ears following noise exposure); *Fries v. Chicago and Northwestern Transp. Co.*, 909 F.2d 1092, 1094-95 (7th Cir. 1990) (ringing in the ears; hearing getting progressively worse after noise exposure); *Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543-44 (1st Cir. 1990); *Billman v. Missouri Pac. R.R.*, 825 S.W.2d 525 (Tex. Ct. App. 1992); *Robb v. CSX Transp., Inc.*, 204 Ga. App. 690, 420 S.E.2d 370 (1992).[5]

Plaintiff cites three FELA hearing loss cases in which summary judgment was denied, and argues, based on these cases, that there exists a conflict of authority requiring this Court to grant a writ of certiorari. To the contrary, in each of the three cases cited by plaintiff, *Bechtholdt v. Union Pac. R.R. Co.*, 722 F. Supp. 704 (D. Wyo. 1989); *Smith v. States Marine Intern., Inc.*, 864 F.2d 410 (5th Cir. 1989); and *Monagahan v. Union Pac. R.R. Co.*, 242 Nob. 720, 496 N.W.2d 895 (1993), the particular facts of the case merited denial of the defendant's summary judgment motion.

The circumstances of those cases, however, are easily distinguishable from the facts of the instant case. In both *Bechtholdt* and *Smith*, for example, the plaintiffs provided clear evidence of an alternative cause (other than work-related noise) which they reasonably believed might have

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[5] Johnson mischaracterizes the holding of *Robb* at pages 4-5 of his Petition. *Robb* does not stand for the proposition that "a cause of action accrues whenever the plaintiff's ears first manifest any abnormality" as plaintiff asserts. The case held, properly, that the cause of action accrued when the plaintiff knew, or should have known, of "his condition and its cause."

caused their hearing loss. Thus, the claims were not barred because the plaintiffs did not know more than three years before filing their actions (1) that they had experienced hearing loss *and* (2) that the loss was work-related. 722 F. Supp. at 705; 864 F.2d at 412.[6] Here, however, Johnson conceded the *only* possible source of his hearing loss was workplace noise exposure. (JA 35.) In *Monagahan* the plaintiff produced evidence that, despite prior tinnitus, he did not experience an actual loss of hearing until 1987, only a year before he filed suit. *Monagahan*, 496 N.W.2d at 902. By contrast, here, Johnson could not remember when he experienced hearing loss, he admitted that it might have been more than three years before he filed suit, and medical evidence placed this loss well outside the statute of limitations. (JA 32-33, 65.)

B. The Courts Below did not Depart From the Prior Precedent of this Court; Rather the Courts Properly Rejected Johnson's Effort to Rewrite the Discovery Rule and Rejected Johnson's Improper Argument that the Statute of Limitations Should only be Triggered by the Plaintiff's Subjective Awareness That He Had Suffered "Permanant" Injury.

All of the cases discussed above faithfully cite the *Urie* discovery rule and place upon the plaintiff the duty

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[6] It is disingenuous for Johnson to assert, as he does at page 4 of his petition, that "the court below rejected the same arguments that persuaded the court in *Bechtholdt*." To the contrary, the Fourth Circuit clearly distinguished *Bechtholdt*, noting, "Unlike Johnson, the plaintiffs in *Bechtholdt* believed their hearing problems were caused either by aging or an automobile accident, not by work. *Id.* at 715." (App. 6a, n.3.)

to act within three years of the date he knew *or should have known* of his injury. It is Johnson who seeks to depart from the traditional discovery rule by arguing that the limitations period should be held in abeyance until he subjectively became aware that his hearing loss was "permanent." The Fourth Circuit rejected this contention persuasively below:

> Johnson [argues] that, although he may have experienced *temporary* hearing problems, or temporary threshold shift [TTS], in 1984 or before, he first realized that he might have *permanent* hearing loss during a conversation with co-workers that occurred sometime between May 16 and December 12, 1986. Since only permanent hearing loss is actionable under FELA, he reasons that he filed suit within three years of the time his action actually accrued. *See* Appellant's Br. at 11-17. We reject this *post hoc* effort to distinguish between temporary and permanent hearing loss for purposes of tolling the FELA statute of limitations. In many if not most cases, the dichotomy is false, since recurrent temporary (i.e., lasting for a day or two) hearing loss is a recognized symptom of permanent injury. Johnson's own expert Dr. Schumaier noted in his affidavit that "repeated episodes of TTS" are a sign that "permanent injury is occurring." J.A. at 74 par. 6.

(App. 5a, emphasis in original.)[7]

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[7] Moreover, this petition does not cleanly present the "permanent/temporary" distinction emphasized by Johnson. The only evidence dealing with Johnson's subjective belief of the "permanency" of his hearing loss is contained in his affidavit which flatly contradicts his prior deposition statements and

The Fourth Circuit went on to uphold the district court's finding that Johnson, based upon the extensive hearing difficulties he had experienced, should have known of his work-related injury long before the date he claims to have recognized his hearing loss was "permanent:"

> As the district court held, when Johnson began experiencing a ringing sensation in his ears and began noticing that his hearing was worse at the end of the work day than at the beginning, that he was forced to turn up his radio very loud in order to hear it when returning home from work, and that he was having trouble hearing conversations, he should have known of his work-related injury for purposes of the FELA statute of limitations. *See Bealer v. Missouri Pac. R.R.*, 951 F.2d 38, 40 (5th Cir. 1991) (temporary hearing loss and ringing in ears provided constructive notice of work-related injury to FELA claimant); *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1097 (7th Cir. 1990) (temporary work-related ringing in the ears put plaintiff on constructive notice of injury for FELA purposes) . . .

(App. 5a.)

Despite Johnson's efforts to champion a new requirement of "subjective knowledge of permanent injury" before the statute of limitations is triggered, the standard under FELA is an *objective* one. Johnson fails to present even a single case which states otherwise. Simply put, if a

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which, therefore, ought not be considered. *Barwick v. Celotex*, 736 F.2d 946 (4th Cir. 1984).

plaintiff experiences symptoms of injury only in relation to workplace exposure, and he cannot point to any other cause for the injury, then the plaintiff is held to be on notice that he has suffered a work-related injury and the statute of limitations begins to run. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 416 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 337 (1991); *see also Fries*, 909 F.2d at 1095 (discovery rule does not allow plaintiff to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury"); *Townley v. Norfolk and Western Ry. Co.*, 887 F.2d at 501.

Johnson's symptoms, which he has admitted experiencing as early as December 1984, and perhaps even earlier, were sufficient to begin the running of the statute of limitations. (JA 65, 32-33.) Coupled with his actual and constructive knowledge of the work-related cause of his injury (JA 35), it is clear that Johnson possessed the critical facts regarding his cause of action more than three years before he filed his suit.

* * *

Thus, Johnson's petition presents none of the requisite elements for the granting of a writ of certiorari. He has failed to illustrate that there is a split of authority in application of the discovery rule or that the decision below constituted a departure in any respect from the precedent of this Court. In reality, the Fourth Circuit and the district court below applied well-settled law to the facts of this case and reached the only result possible – that Johnson's claim was time-barred. That decision was correct and warrants no further review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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